

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HORACE THOMAS,

Plaintiff,

v.

MERLE BRUCE,

Defendant.

Case No. 2:14-cv-00619-MMD-CWH

SCREENING ORDER
ON AMENDED COMPLAINT

Plaintiff, a prisoner in the custody of the California Department of Corrections and Rehabilitation, has submitted an amended civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed a motion to strike and three motions for appointment of counsel. (Dkt. nos. 16, 24, 25, 30, 31.) Defendant has filed a motion to dismiss. (Dkt. no. 21.)

On June 3, 2014, this Court entered a screening order on Plaintiff's original complaint and dismissed the complaint in its entirety, with prejudice, for failure to state a claim. (Dkt. no. 6 at 5.) The Court also denied Plaintiff's application to proceed *in forma pauperis* as moot. (*Id.*) Plaintiff appealed. (Dkt. no. 9.) The Ninth Circuit issued an order acknowledging that the Court had properly dismissed Plaintiff's complaint for failure to state a claim but held that the Court abused its discretion by not providing Plaintiff with an opportunity to amend. (Dkt. no. 14 at 2.) The Court now screens Plaintiff's amended civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a

1 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
2 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
3 claim upon which relief may be granted or seek monetary relief from a defendant who is
4 immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however,
5 must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
6 Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
7 elements: (1) the violation of a right secured by the Constitution or laws of the United
8 States, and (2) that the alleged violation was committed by a person acting under color
9 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

10 In addition to the screening requirements under § 1915A, pursuant to the Prison
11 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the
12 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a
13 claim on which relief may be granted, or seeks monetary relief against a defendant who
14 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
15 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
16 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
17 reviewing the adequacy of a complaint or an amended complaint. When a court
18 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
19 complaint with directions as to curing its deficiencies, unless it is clear from the face of
20 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
21 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

22 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
23 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for
24 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of
25 facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*,
26 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true
27 all allegations of material fact stated in the complaint, and the court construes them in
28 the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957

(9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*

Additionally, a reviewing court should “begin by identifying pleadings [allegations] that, because they are no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the framework of a complaint, they must be supported with factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

II. SCREENING OF AMENDED COMPLAINT

In the amended complaint, Plaintiff sues Defendant Dr. Merle Bruce of Reno, Nevada, for events that took place while Plaintiff was incarcerated at High Desert State Prison in Susanville, California. (Dkt. no. 16 at 1-2.) Plaintiff alleges one count and seeks monetary damages. (*Id.* at 4, 9.)

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1 The complaint alleges the following: On February 10, 2013, several white
2 supremacists assaulted Plaintiff causing Plaintiff to suffer a fractured nasal passage and
3 jaw. (*Id.* at 3.) Prison officials hospitalized Plaintiff on the prison grounds and then
4 contracted Dr. Bruce to repair Plaintiff's jaw. (*Id.*) Dr. Bruce accepted the contract. (*Id.*)
5 On March 1, 2013, Dr. Bruce had prison officials transport Plaintiff to Renown Hospital
6 in Reno. (*Id.* at 4.) Dr. Bruce did not explain any procedures to Plaintiff. (*Id.*) When
7 Plaintiff was "put under," Dr. Bruce sliced a portion of Plaintiff's throat instead of going
8 through Plaintiff's mouth. (*Id.*) Dr. Bruce placed a rod inside of Plaintiff's chin which
9 damaged the nerve in front of Plaintiff's chin. (*Id.*) A piece of Plaintiff's tooth root was left
10 protruding through the bottom of the gum below the wired area. (*Id.*) Plaintiff's chin
11 remains numb which affects his eating and speech. (*Id.*) Plaintiff frequently bites his lip
12 because Dr. Bruce set his jaw incorrectly. (*Id.*) Dr. Bruce had a "sufficiently culpable
13 state of mind during the surgery." (*Id.*) Plaintiff alleges an Eighth Amendment violation.
14 (*Id.*)

15 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
16 and "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity,
17 and decency.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the
18 Eighth Amendment when he acts with "deliberate indifference" to the serious medical
19 needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "To establish an
20 Eighth Amendment violation, a plaintiff must satisfy both an objective standard — that
21 the deprivation was serious enough to constitute cruel and unusual punishment — and
22 a subjective standard — deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985
23 (9th Cir. 2012).

24 To establish the first prong, "the plaintiff must show a serious medical need by
25 demonstrating that failure to treat a prisoner's condition could result in further significant
26 injury or the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091,
27 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
28 prong, a plaintiff must show "(a) a purposeful act or failure to respond to a prisoner's

1 pain or possible medical need and (b) harm caused by the indifference.” *Id.*
2 “Indifference may appear when prison officials deny, delay or intentionally interfere with
3 medical treatment, or it may be shown by the way in which prison physicians provide
4 medical care.” *Id.* (internal quotations omitted). When a prisoner alleges that delay of
5 medical treatment evinces deliberate indifference, the prisoner must show that the delay
6 led to further injury. *See Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404,
7 407 (9th Cir. 1985) (holding that “mere delay of surgery, without more, is insufficient to
8 state a claim of deliberate medical indifference”).

9 “[A] complaint that a physician has been negligent in diagnosing or treating a
10 medical condition does not state a valid claim of medical mistreatment under the Eighth
11 Amendment. Medical malpractice does not become a constitutional violation merely
12 because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Even
13 gross negligence is insufficient to establish deliberate indifference to serious medical
14 needs. *See Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

15 The Court finds that Plaintiff fails to state an Eighth Amendment claim for
16 deliberate indifference to serious medical needs. Based on the allegations, Dr. Bruce
17 treated Plaintiff shortly after the California prison contracted him to perform surgery on
18 Plaintiff. Instead, Plaintiff attempts to argue that Dr. Bruce did a poor job during surgery
19 which has left Plaintiff numb, unable to eat and speak, and unable to close his jaw
20 correctly. Plaintiff is once again attempting to allege a claim for medical malpractice
21 which is not cognizable as a constitutional violation. As such, the Court dismisses the
22 claim with prejudice, as amendment would be futile, for failure to state a claim.

23 **III. MOTION TO DISMISS & STRIKE**

24 The Court dismisses Dr. Bruce’s motion to dismiss (dkt. no. 21) and Plaintiff’s
25 motion to strike the motion to dismiss (dkt. no. 24) as moot because Plaintiff has failed
26 to state a cognizable claim during screening.

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1 **IV. MOTIONS FOR APPOINTMENT OF COUNSEL**

2 Plaintiff has filed three motions for appointment of counsel. (Dkt. nos. 25, 30, 32.)
 3 A litigant does not have a constitutional right to appointed counsel in 42 U.S.C. § 1983
 4 civil rights claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant
 5 to 28 U.S.C. § 1915(e)(1), “[t]he court may request an attorney to represent any person
 6 unable to afford counsel.” However, the court will appoint counsel for indigent civil
 7 litigants only in “exceptional circumstances.” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th
 8 Cir. 2009) (§ 1983 action). “When determining whether ‘exceptional circumstances’
 9 exist, a court must consider ‘the likelihood of success on the merits as well as the ability
 10 of the petitioner to articulate his claims *pro se* in light of the complexity of the legal
 11 issues involved.” *Id.* “Neither of these considerations is dispositive and instead must be
 12 viewed together.” *Id.* In the instant case, the Court does not find exceptional
 13 circumstances that warrant the appointment of counsel. The Court denies the motions
 14 for appointment of counsel.

15 **V. CONCLUSION**

16 For the foregoing reasons, it is ordered that the amended complaint (dkt. no. 16)
 17 is dismissed in its entirety, with prejudice, as amendment would be futile, for failure to
 18 state a claim.

19 It is further ordered that the motion to dismiss (dkt. no. 21) is denied as moot.


20 It is further ordered that the motion to strike (dkt. no. 24) is denied as moot.

21 It is further ordered that the motions for appointment of counsel (dkt. nos. 25, 30,
 22 32) are denied.

23 It is further ordered that this Court certifies that any *in forma pauperis* appeal
 24 from this order would not be taken “in good faith” pursuant to 28 U.S.C. § 1915(a)(3).

25 It is further ordered that the Clerk of the Court shall enter judgment accordingly.

26 DATED THIS 9th day of June 2015.

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 28 MIRANDA M. DU
 UNITED STATES DISTRICT JUDGE